

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2655

To be argued by:
LAWRENCE STERN

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA ex. rel :

ALFRED LEWIS, :

Petitioner/Appellant, :

-against- :

ROBERT J. HENDERSON, Superintendant :
of Auburn Correctional Facility, :

Appellee. :

Docket No. 74-2655

-----X

ON APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF NEW YORK

LAWRENCE STERN
Attorney for Petitioner/
Appellant
11 Monroe Place
Brooklyn, N.Y. 11201
★ (212) 875-4304

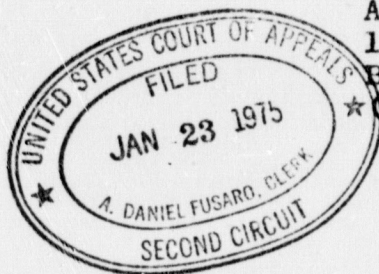


TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF AUTHORITIES</u>	<u>1</u>
<u>ISSUES PRESENTED</u>	<u>1</u>
<u>STATEMENT PURSUANT TO RULE 28 (a) (3)</u>	<u>2</u>
A. Preliminary Statement	2
B. Statement of Facts	2
<u>ARGUMENT</u>	
POINT I -- UNCONTRADICTED AND CORROBORATED FACTS OF BASELESS ARREST, 38 HOUR INCOMMUNICADO DETENTION, 19 HOUR CONTINUOUS INTERROGATION, NO FOOD OR SLEEP, NO RIGHTS ADVICE, FALSE PROMISES AND DECEPTIONS AND PHYSICAL BEAT- INGS, AND THE UNFAIR PROCEEDINGS AND IMPROPER STANDARDS APPLIED TO THE ESTABLISHMENT AND ADJUDICATION OF THESE FACTS BY THE STATE OF NEW YORK, REQUIRE A FINDING OF THE INVOLUNTARINESS OF THE RESULTANT CONFESSIONS AND A VACATUR OF THE CONVICTION TO WHICH THESE CON- FESSIONS CONTRIBUTED.	17
<u>CONCLUSION</u>	<u>41</u>

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Arsenault v. Massachusetts,</u> <u>393 U.S. 5 (1968)</u>	4,34
<u>Ashcroft v. Tennessee,</u> <u>322 U.S. 143 (1944)</u>	21
<u>Blackburn v. Alabama,</u> <u>361 U.S. 199 (1960)</u>	22
<u>Bram v. United States,</u> <u>168 U.S. 532</u>	22,26
<u>Brown v. Mississippi,</u> <u>297 U.S. 278 (1936)</u>	21
<u>Clewis v. Texas,</u> <u>386 U.S. 707 (1969)</u>	21
<u>Culombe v. Connecticut,</u> <u>367 U.S. 568 (1961)</u>	21,26
<u>Davis v. Mississippi,</u> <u>394 U.S. 721 (1969)</u>	25
<u>Davis v. North Carolina,</u> <u>389 U.S. 737 (1965)</u>	21,23
<u>Ferranto v. United States,</u> <u>Dcket # 74-1366 (2d Cir.,</u> <u>decided October 31, 1974)</u>	38
<u>Gilbert v. California,</u> <u>388 U.S. 263 (1967)</u>	20

LAWRENCE STERN

ATTORNEY AT LAW

11 MONROE PLACE

BROOKLYN, N.Y. 11201

(212) 875-4304

January 29, 1975

The Chief Judge and
Associate Judges of the
United States Court of Appeals for the
Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: United States ex rel.
Alfred Lewis v. Henderson
Docket No. 74-2655

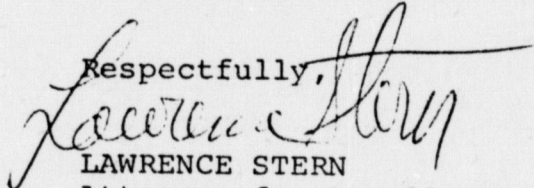
Your Honors:

Inadvertently omitted from the statement of facts of exhaustion of state remedies in the brief filed in this Court on January 23, 1975, in the above-captioned case, is the order and opinion of the Supreme Court of the State of New York, Bronx County [McCaffrey, J] entered on March 15, 1973.

That order denied appellant's coram nobis application for a Huntley re-hearing. Appellant's allegations that his prior Huntley hearing was unfairly conducted, that he was denied necessary witnesses, and that unconstitutional legal standards of voluntariness had been applied were rejected, as they had been on the direct appeal from the prior Huntley determination, and leave to appeal to the Appellate Division was denied on May 8, 1973 [C.P.L. §§450.15, 450.90]. A copy of the order-opinion of the Bronx Supreme Court is attached to this letter.

I apologize for this omission in the brief and respectfully request that this letter be appended, attached or enclosed with the brief.

LS/djp
Enc.

Respectfully,

LAWRENCE STERN
Attorney for Appellant Lewis

c.c.: Attorney General of the
State of New York
Two World Trade Center
New York, New York

EXHIBIT A

Opinion-order of the Supreme Court of Bronx County
denying motion made pursuant to CPL §440.10

The People of the State of New York

against

Alfred Lewis,

Defendant

) File Number 219 1958 Motion
) for Huntley hearing submitted
) February 15, 1973
) Present:
) Hon. Edward T. McCaffrey

Papers Numbered

Notice of Motion and Affidavit Annexed
Order to Show Cause and Affidavits Annexed
Answering Affidavits
Replying Affidavits
Exhibits
Stenographer's Minutes

1
2

Upon the foregoing papers this motion for an order granting the defendant a Huntley hearing is denied.

The defendant was afforded a Huntley hearing on the voluntariness of his confessions and the application was denied on March 24, 1970 after a hearing. The order was affirmed on appeal (35 A.D. 2d 1086).

He now claims that the hearing only encompassed two of the four confessions and that he is entitled to a further hearing on the other two. He claims that the district attorney wilfully resorted to a deception when he told defense counsel that Deputy Inspector Philip Walsh, who was present at the interrogations, was unavailable either because he was no longer alive or that his address was unknown. The defendant now states, and submits, a copy of a letter from the New York City Pension Bureau that a retired Chief of Detectives,

Philip Walsh, is still receiving pension benefits. The defendant states that his counsel made no attempt to locate Walsh and that inasmuch as Walsh was present at the times of the interrogation, he was deprived of his right to either call or interrogate Walsh.

The Huntley hearing record reflects that two witnesses testified for the defendant and two police witnesses appeared as prosecution witnesses. The defendant did not testify and the facts do not come within People v. Valerius, 31 N.Y. 2d 51.

At the time of the 1970 hearing the district attorney offered in evidence the trial record. Counsel had the opportunity to challenge the confessions alluded to by the defendant. He did not do so. More important, the defendant did not testify at the hearing. He could have raised the issue of the voluntariness of those statements at the time. He makes no showing as to the nature of Walsh's potential testimony.

The mere conclusory statement of a denial of due process, after a hearing was granted and the entire trial record was offered in evidence, does not give the defendant the right to another Huntley hearing (CPL § 440.10(3)(C)(1)).

Opinion filed herewith

Dated 3/15/73.

J.S.C. E.T. Mc.
(Edward T. McCaffrey)

<u>Haley v. Ohio</u> , 332 U.S. 596 (1948)	Page 21
<u>Haynes v. Washington</u> , 373 U.S. 503 (1962)	21,23,27
<u>Hobbs v. Peppersack</u> , 301 F. 2d 875 (4th Cir.1962)	38
<u>Jackson v. Denno</u> , 378 U.S. 368 (1964)	13,40
<u>Johnson v. New Jersey</u> , 384 U.S. 719 (1965)	24
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	17,22,26,40
<u>Molloy v. Hogan</u> , 378 U.S. 1 (1964)	22,26,32
<u>Morales v. New York</u> , 396 U.S. 102 (1969)	25
<u>Negron v. Henderson</u> , 496 F. 2d 858 (2d Cir.1974)	29
<u>Payne v. Arkansas</u> , 356 U.S. 560 (1957)	21
<u>People v. Huntley</u> , 15 N.Y. 2d 72 (1965)	13
<u>Rogers v. Richmond</u> , 365 U.S. 534 (1961)	22,35
<u>Sanders v. United States</u> , 373 U.S. 1 (1963)	37
<u>Townsend v. Sain</u> , 372 U.S. 293 (1963)	30,34
<u>Tucker v. United States</u> , 427 F. 2d 615 (D.C. Cir. 1970)	39
<u>United States ex. rel. Everett v. Murphy</u> 329 F. 2d 68 (2d Cir., 1964) cert. den. 377 U.S. 967	22,25,26
<u>United States ex. rel. Stovall v. Denno</u> , 388 U.S. 293 (1961)	20
<u>United States ex rel. Wade v. Jackson</u> , 256 F. 2d 7 (2d Cir., 1958)	17,20,21,22
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	21,40
<u>New York Code of Criminal Procedure §165</u>	18,24
<u>New York County Law § 722-B</u>	13
<u>Reitz, Federal Habeas Corpus: Post conviction Remedy for State Prisoners</u> , 108 U. Pa. L. Rev 461 (1960)	39

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.

ALFRED LEWIS,

Petitioner/Appellant,

-against-

ROBERT J. HENDERSON, Superintendant
of Auburn Correctional Facility,

Appellee.

-----X

ISSUES PRESENTED

1. Whether uncontradicted and corroborated facts of baseless arrest, 38 hour incommunicado detention, 19 hour continuous interrogation, no food or sleep, no rights advice, false promises, deceptions and physical beatings, and the unfair proceedings and improper standards applied to the establishment and adjudication of these facts by the State of New York, require a finding of the involuntariness of the resultant confessions and a vacatur of the conviction to which these confessions contributed.

STATEMENT PURSUANT TO RULE 28 (a) (3)

A. Preliminary Statement

This is an appeal from an order of the United States District Court for the Northern District of New York [Port, J] entered on August 20, 1974, denying appellant's petition for a writ of habeas corpus. Timely notice of appeal was filed, and on December 19, 1974, this Court granted appellant's motions for a certificate of probable cause, and for in forma pauperis relief and the assignment of counsel on appeal. Subsequently, as per a voucher form dated December 30, 1974, Lawrence Stern, Esq. was assigned as counsel on appeal.

B. Statement of Facts

By these proceedings, appellant seeks to have vacated a judgment of conviction rendered against him in the former County Court of Bronx County of the State of New York [McCaffrey, J.] on November 25, 1958, convicting appellant, after trial by jury, of the crimes of robbery, grand larceny, and assault and sentencing him to a term of imprisonment of 30 to 60 years.

In his petition for a writ of habeas corpus filed in the Northern District of New York, appellant attacked this conviction as having resulted from the admission of involuntary confessions in evidence against him at trial and from the deprivation of

the opportunity to have a fair and full hearing and an adjudication with the application of proper standards to the facts surrounding the extraction of those confessions. From the trial testimony, and the testimony taken at the unfairly conducted post-trial Huntley hearing, the following uncontradicted facts are recorded: the confessions were made during a 38 hour incommunicado detention without probable cause at two police precincts in Manhattan and the Bronx prior to any booking or arraignment, during which time appellant, a 22 year old with a 9th grade education and "severe character disorder of the schizoid type," was not fed or permitted to sleep or advised of his constitutional rights, and during which time he was promised that certain charges against him would be dropped, that evidence uncovered by him would not be used against him, and that he would be helped in court by the detectives, and during which time he was beaten by an Inspector Walsh and other detectices (whose presence on the scene and existence were verified, but who were never called by the People to contradict those allegations). On the basis of these facts, never contradicted by the State of New York, appellant has rightly argued that the confessions thereby obtained were involuntary as a matter of fact and as a matter of law, and that his conviction, which relied on them, cannot stand under the Fifth, Sixth and Fourteenth amendments to the Constitution and decisions thereunder. Furthermore, appellant was deprived of a fair determination of

the issue of voluntariness, both at the trial, by the jury, and, later, by the trial judge at the Huntley hearing, because the same judge both charged the jury and applied in his own Huntley determination, standards of voluntariness which disregarded the aspects of psychological coercion and failure of rights advice presented by the uncontradicted facts of the case. Thus, for these reasons, and because the trial and Huntley judge refused appellant's requests to have Inspector Walsh and the other law enforcement officers subpoenaed at the Huntley hearing, and because the trial judge did not consider the separate confessions involved and did not address the issues of lack of probable cause, psychological coercion, appellant's mental state, the delay in arraignment, and the lack of food and sleep and rights advice, and because, despite all of the above, the judge simply chose to rely on appellant's failure to complain of his beatings at the delayed arraignment when he was unrepresented by counsel (Arsenault v. Massachusetts, 393 U.S. 5 (1968)), appellant has never had a fair hearing on the voluntariness of those confessions.

The Procedural History of the Case--Exhaustion of State Remedies

On November 25, 1958, appellant was convicted, after a trial by jury, of the crimes of Robbery, Grand Larceny and Assault for robbing a Manufacturer's Hanover Trust Company Bank and received a

sentence of imprisonment for 30-60 years. Under the pre-Jackson v. Denno procedure, appellant testified at trial to the facts surrounding his confession. Based primarily on the testimonies of two detectives, Beckles and Corbett, and after consideration primarily of the issue of physical abuse, the confessions were admitted into evidence and the issue of voluntariness was passed to the jury. A defense motion to instruct the jury that it could consider mental as well as physical factors in determining voluntariness was denied and the jury was expressly restricted to a consideration of physical coercion (T. 667). The conviction was affirmed without opinion by the Appellate Division in People v. Lewis, 10 A.D. 2d 924 (1st Dept., 1960) and leave to appeal to the Court of Appeals was denied on July 15, 1960.

Based on appellant's pro se writ of error coram nobis, a Huntley hearing was held in January, 1970 to determine the voluntariness of the confessions. Appellant rested on his trial testimony and produced two witnesses. Detectives Beckles and Corbett testified again for the State as they had at the trial with some significant changes in their testimony. Justice Edward T. McCaffrey presided at the Huntley hearing as he had at the trial. In his opinion dated March 24, 1970 (see appendix) Justice McCaffrey concluded:

This Court is satisfied beyond a reasonable doubt that the statements made by defendant to Detective Beckles and to Detective Corbett, respectively, on the 18th of February, 1958 at the 42nd Precinct were voluntarily made and were not the result of physical coercion of any kind. Accordingly, the motion is denied. (Emphasis added)

The opinion did not make a finding on the possible mental coercion resulting from the pre-confession custody, although the court was again specifically requested to make such a finding. The Huntley decision was affirmed without opinion on the appeal in People v. Lewis, 35 A.D. 2d 1086 (1st Dept., 1970) . Leave to appeal to the Court of Appeals was denied on December 15, 1970.

Appellant attacked unsuccessfully the refusal of the trial court to charge the jury that it could consider mental factors in assessing the confessions' voluntariness in a pro se application for habeas corpus to the Supreme Court, Bronx County. The application was denied without a hearing on November 10, 1969 (Sarafite, J.) and affirmed without opinion on appeal in People ex. rel. Lewis v. Warden, 34 A.D. 2d 736 (1st Dept., 1970). Leave to appeal to the Court of Appeals was denied on June 15, 1970 (313 N.Y.S. 2d 1026). Thus, with all of the above, the State having passed on all these issues and no State remedies being presently available, appellant has exhausted his State remedies.

Appellant also attacked unsuccessfully both the voluntariness of his confession on the grounds of physical and mental coercion and the erroneous jury charge in a pro se application for habeas corpus to the United States District Court, Western District of New York. In a summary decision dated June 28, 1971 (see appendix) Judge John J. Curtin simply repeated verbatim the conclusion of the Huntley judge.

Upon review of the transcript and the (Huntley) Court's decision, this Court finds no reason to disturb his conclusion that the petitioner's statements to the officers were voluntarily made and were not the result of physical coercion of any kind. (Emphasis added)

Again, no mention was made in Judge Curtin's decision of the mental factors bearing on voluntariness. In a supplemental opinion dated August 3, 1971, Judge Curtin stated in one sentence, without supportive reasoning, that the claim of error in the jury charge was "without merit" and denied probable cause to appeal. A pro se motion for certificate for probable cause was denied by this Court on May 1, 1972. A pro se petition for certiorari to the United States Supreme Court was denied on December 4, 1972.

Raising the additional issues of the unresponsiveness of Court and counsel at the Huntley hearing to his request for the attendance and testimony of Inspector Walsh and other officers who participated in his interrogation and beating at the two Precincts, appellant again pro se, brought the instant application for habeas corpus in the Northern District of New York. In an opinion dated August 20, 1974 (See Appendix), Judge Edmund Port denied the petition because,

Judge McCaffrey found petitioner's statements to be voluntary and not the result of physical coercion of any kind. Judge Curtin, after his own review of the full file in petitioner's case, found no reason to upset Judge McCaffrey's determination on the Huntley hearing and likewise

dismissed petitioner's contentions in connection with the voluntariness of his confessions... I will not presume that both judges were unaware of and applied the wrong standards to test the voluntariness of petitioner's confessions.

Appellant filed a timely notice of appeal, but on October 3, 1974, Judge Port denied a certificate of probable cause.

On December 19, 1974, pursuant to a motion to this Court filed on appellant's behalf by counsel representing appellant without fee, the Court granted appellant a certificate of probable cause permitting the instant appeal.

The Facts Elicited at Trial and Huntley Hearing

At approximately 12:30 P.M. on February 6, 1958, the Manufacturer's Hanover Trust Company at 155th Street and Third Avenue, Bronx, was robbed by a lone gunman. Upon entering the bank, the robber ordered the bank manager and a customer to collect the tellers' loose cash in two shopping bags. The bags were then given back to the robber and he fled. The entire event lasted less than five minutes, with some \$12,000 being stolen. Appellant was convicted after a jury trial of this robbery.

Eleven days after the robbery on February 17, 1958 at approximately 8:30 P.M. the appellant, then a 22 year old black man with a 9th grade education, was arrested by Detective Vincent Beckles in the lobby of an apartment house at 41 Convent Avenue, Manhattan (T. 32-322)². Beckles testified that the arrest was

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2 References to the trial transcript are designated "T" and references to the subsequent hearing on voluntariness are designated "HM".

based solely on a complaint made earlier the same day by Mrs. Elizabeth Waller, a resident at the same address (T. 322), that on February 8th or 10th appellant had left a briefcase containing a large sum of money at her apartment for safekeeping (T. 275-278). He returned for the briefcase on February 16th and told her that some \$1,700 was missing and that he would return in a few days for the money (T. 283, 286, 293, 296). Although not arrested for the bank robbery, appellant was immediately taken to the 30th Precinct in Manhattan and questioned about the missing briefcase and the money (T. 400) and he claimed initially that the money had been won at gambling.

Appellant was held in custody at the 30th Precinct during the night of February 17-18 and upon his arrival there and throughout the night he was interrogated about the Bronx bank robbery and urged to disclose the location of the money which helped convict him (T. 354-360) and to confess to the robbery (T. 337, 399-401; HM 73-a).

Appellant testified (T. 400) he was physically beaten throughout this interrogation, and this testimony has never fairly been contradicted since Detective Beckles and Corbett, who were the only law enforcement people called to counter appellant's charges of coercion, testified that they were not among those who interrogated the petitioner during this time (T. 337, 347; HM 73-a) although the petitioner named Corbett as one of the major participants in the interrogation and beating (T. 401, 402). There has been no testimony that appellant was not beaten during this interrogation.

At the trial, Beckles testified that he was investigating exclusively the Waller complaint and that he did not question appellant about the bank robbery (T. 324). At the Huntley hearing, Beckles admitted that at the 30th Precinct, sometime after the arrest, he was "involved with the investigation of this robbery that the defendant, Alfred Lewis, was eventually convicted of." (HM 59). Beckles did not remain at the Precinct with appellant, and appellant was left in the hands of other officers throughout the night, some of whom were engaged in the robbery interrogation (T. 337, HM 58-59, 69). At no time was appellant ever booked on the Waller complaint for which he was ostensibly arrested (T.324).*

Throughout the night and the following morning appellant maintained his innocence. He did not sleep or eat. He was moved to the 42nd Precinct in the Bronx at approximately 1 P.M. on February 18 (T. 322-324). There the interrogation was continued and he soon "agreed" to get the briefcase containing the money (T. 326). Appellant testified that he was physically beaten at this time (T. 405). He further testified uncontradictedly (T. 405) that his interrogators then told him that a criminal charge pending in another jurisdiction would be dropped if he produced the money used against him at the trial. Additionally, Detective Beckles testified in effect (T. 325-326) that he

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* It should be noted that at the trial, the court refused to consider the circumstances of the arrest, the absence of probable cause, or the events at the 30th Precinct, all of which it regarded as not connected to the robbery case. (T.335-337)

promised the appellant that if he disclosed the location of the money subsequently used to convict him, his position that the money belonged to him as the result of winning same at gambling would not be impugned, and that it was immediately after this exchange that appellant agreed to lead the police to the money. Accompanied by police officers and a friend of appellant, he was taken from the Precinct for a short time. Upon returning with the briefcase, appellant confessed to the Bronx Bank robbery at approximately 3:30 P.M. after receiving a promise of "help" from Detective Corbett (T. 381).

Detective Corbett testified at the trial and the Huntley hearing that he was in charge of the Bronx bank robbery case, and that he was called to the 30th Precinct in Manhattan on the night of the arrest on February 17, 1958, because they said they had the robbery suspect (T 347, HM 71). He remained at the 30th Precinct overnight, except for about an hour when he was not there (HM 73). Corbett testified that he did not question appellant at the 30th Precinct, but he did see appellant go into a room with other officers; he did not know the nature of the questioning by those officers (HM 73a). He was told that a lineup had been conducted that night, and he saw and spoke to the witnesses in the precinct house (HM 72-73). Corbett testified at the trial that he didn't think appellant slept on the night of the arrest (T. 382). At the Huntley hearing, he testified that he saw appellant taken into a police dormitory room * but only for 20 minute intervals (HM. 73a-74). Beckles said he saw the same thing

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* Appellant testified that some of the beatings took place in a room with beds.

but he said the intervals were 15, 30 or 45 minutes (HM 68). Neither detective saw appellant sleep. Neither detective saw him eat. Corbett saw food go into the room (T. 350, HM 74).

Both Corbett and Beckles took appellant from the 30th Precinct in Manhattan to the 42nd Precinct in the Bronx the next day at about 12:00 or 12:30 P.M. They all arrived there at about 1 P.M. and the interrogation proceeded immediately. Beckles testified that he told appellant that appellant was now in the custody of the Bronx police and that all they wanted was the bank money and that all he need do is tell them where it was and that he could still maintain that the money was gambling proceeds (T. 325-326). Corbett testified that prior to this Beckles interrogation, he (Corbett) in the presence of three other detectives, had interrogated Appellant and had convinced him to lead them to the money by telling appellant that it was to his benefit to have his gambling proceeds in safekeeping (T. 367). Corbett further testified that appellant received no food or water after 1 P.M. at the 42nd Precinct. (T. 350, 382).

After this initial interrogation, at about 2 P.M. appellant agreed to go with Beckles and a friendly witness to retrieve what appellant was still maintaining was his own money. They returned to the 42nd Precinct at 3 P.M. with the money, and interrogation was begun again immediately, at first by Corbett alone in a room with appellant. A confession resulted from this interrogation, after Corbett made promises to appellant:

I promised him I'd help him when
I get to court (T. 381)

he had to put his trust in somebody and we were the one who could help him and since I was working on this case, I would see what I could do for him... (T. 381)

Now, you have to put your trust in somebody, and we were the ones that can help you... (T. 371)

Corbett testified that at no time was appellant ever advised of his Constitutional rights (HM 82).

Corbett testified that he and appellant were alone during the confession ⁶ (T. 350; HM 82). The confession was subsequently repeated in the presence of other detectives. Appellant was standing throughout and he still had not eaten (T. 339). It was repeated a third time to an assistant district attorney and a stenographer (T. 375, 408, 514-532; HM 77, 82). Both Beckles and Corbett testified at trial (T. 335, 338-40, 375) and again at the Huntley hearing (HM 66, 82-83) that other law enforcement officials, including the F.B.I. and an Inspector Walsh, who took the statement and who appellant accused of having a major role in the 30th Precinct interrogation and beating he underwent to extract confessions and other evidence, were present when the confession was repeated. Neither Walsh nor any other law enforcement people besides Detectives Beckles and Corbett were ever called as witnesses, despite appellant's attempts at the Huntley hearing (HM 3,5,6,7,8,9, 24-25)., to have them produced to testify pursuant to the mandates which control such confession voluntariness hearings (People v. Huntley, 15 N.Y. 2d 72, 77; Jackson v. Denno, 378 U.S. 368, 391, 393-394 (1964); N.Y. County Law § 722-B).

6 Appellant testified that another man was also present who held appellant while Corbett hit him to make him confess (T. 406-407)

Louis Johnson and Joseph Jones (HM 45-56; 96-109, respectively) testified at the Huntley hearing that they were present in the police stations during appellant's detention there -- Jones testifying undisputedly that he was the friend who accompanied appellant and police on the trip to get the money -- and both gave further testimony that tended to support appellant's claim that he was beaten to secure the money and confessions. Johnson saw appellant "pushed... and hit in the stomach" by a police officer at the 42nd Precinct (HM 49, 50). Later, Johnson saw appellant "lying on the floor like a dog" (HM 50). Jones also saw appellant "lying on the floor in pain" at the 42nd (HM 101). He watched police officers "drag" the appellant from one room to another (HM 103).

Other trial testimony relevant to the issue of the voluntariness of the confessions was that of the Bronx House of Detention doctor, Joseph Karpowski. Appellant had testified that his complaints to the doctor were ignored on the first day of his incarceration there and that he was not actually examined by the doctor until four or five days after the arraignment when he again complained of pain from the beatings (T. 423). Dr. Karpowski testified that on February 19, he saw 43 patients between the hours of 12 P.M. and 3 P.M. at the Bronx house, that he saw them four at a time, while sitting and writing and that a single patient would get no more than two or three minutes time including the time it took to dress and undress. Under these circumstances, if a man had bruises, the doctor might not have noticed (T. 430-440); 472-473). The first examination of an entering prisoner is routine, but it is at subsequent examinations that the prisoners

come to him with specific complaints (T. 442). Although the doctor obviously had no independent recollection of appellant's examination, his records for February 19 show no pathological findings or complaints (T. 430).

However, the doctor testified,

I didn't ask him and usually I don't listen, I am not interested whether somebody was beaten up, whether in a fight or so, because that is none of my business. But he told me he was beaten up. (T. 499).

The doctor further testified that on February 26, appellant did come to him complaining of pain from a beating on February 17. The doctor submitted a report to the Warden embodying these specific complaints and those made by appellant on February 28 and March 3, complaining of pain in the upper lumbar region and hematoma and pain in the area between the rectum and the testicles (T. 442, 446, 461, 462, 464, 466). That the doctor could easily neglect to mention complaints in his own daily records is indicated by the fact that he reported to the Warden that appellant complained of constipation, even though his own records show no such complaint. (T. 490-496)

The doctor further testified to putting in his report to the Warden the results of appellant's pre-trial mental examination at Bellevue Hospital which had revealed the diagnosis of "severe character disorder of the schizoid type" (T. 477-478, pre-trial minutes of May 26, 1958 at p. 4 and August 19, 1958 at p. 2).

On cross examination, appellant was asked if he complained to the judge at arraignment about the beatings. Appellant

testified that he had no counsel at arraignment, had no idea of his rights or "what was happening" and was dragged out quickly after an adjourned date was set (T. 421, pre-trial minutes of February 19, 1958). Appellant did complaint to a correction officer in the pens (T. 421).

The other evidence against appellant on the trial consisted of the severely attacked identification testimonies of several customers and tellers who were inside the bank at the time of the robbery, which, according to their testimonies, took three minutes. All the witnesses were invited to the precinct two weeks after the robbery, "to identify the robber; they believed they had him and they wanted me to identify him if it was him" (Gruttner at T. 194) or because, "they had a suspect there that they would like me to identify." (Backenheimer at T. 175), or when, "they asked me to identify a suspect they had" (Calabrese at T. 215). In most of the cases, appellant had been exhibited to the witnesses alone, through a peephole where he was seen to be the only suspect in a room filled with detectives, and the witnesses were asked if this was the man (T. 47-48, 118-125, 155, 160, 175 et seq., 194 et seq.) Two of the witnesses testified they had viewed a four-man lineup, but that appellant was the only man dressed in the same gray hat and blue overcoat worn by the bank robber (T. 217, 249). There was also evidence that the bank tellers and officials had opportunity to discuss their identifications with each other, and that, at least, some of the witnesses were there viewing appellant simultaneously (T. 155, 157, 150, 161).

ARGUMENT

POINT I

UNCONTRADICTED AND CORROBORATED FACTS OF
BASELESS ARREST, 38 HOUR INCOMMUNICADO
DETENTION, 19 HOUR CONTINUOUS INTERROGATION,
NO FOOD OR SLEEP, NO RIGHTS ADVICE, FALSE
PROMISES AND DECEPTIONS AND PHYSICAL BEATINGS
AND THE UNFAIR PROCEEDINGS AND IMPROPER
STANDARDS APPLIED TO THE ESTABLISHMENT AND
ADJUDICATION OF THESE FACTS BY THE STATE
OF NEW YORK, REQUIRE A FINDING OF THE
INVOLUNTARINESS OF THE RESULTANT CONFESSIONS
AND A VACATUR OF THE CONVICTION TO WHICH
THESE CONFESSIONS CONTRIBUTED.

The record in this case presents uncontradicted and corroborated facts comprising a handbook of the long condemned police practices of psychological will overbearance and physical abuse in the extraction of confession of crime. Although appellant's own testimonial allegations of physical beatings have never been specifically contradicted by the state of New York and were verified by two civilian witnesses who were in the 42nd Precinct during part of the 38 hour pre-arraignment detention, the elements of psychological coercion practiced on appellant, aside from any beatings, were enough, in fact and law, to render any statements made by him involuntary.

Appellant was incommunicado (Miranda v. Arizona, 384 U.S. 436 ; Wade v. Jackson, 386 U.S. 21, 256 F. 2d 7) for some 38 hours including the 16 hour overnight period at the 30th Precinct, 3 hour

period at the 42nd Precinct during which the first verbal confession was made, and the following 18 hour overnight period preceding arraignment at 10 A.M. on February 19. During the 16 hours at the 30th Precinct appellant was neither booked nor arraigned (T. 324; HM 63)⁷ on the alleged assault complaint of Mrs. Waller nor on the bank robbery charge which would have been proper since the investigation of this robbery was being carried forward at the 30th Precinct (T. 188,133,154,175,194,215,337,347 399-405). During both the 16 hours at the 30th and the following 3 hours at the 42nd appellant was interrogated by investigators about the Bronx bank robbery to which he eventually confessed (T. 337, 400-401; HM 69, 732). At no time during this 19 hour pre-confession period was appellant advised of his right to remain silent or that anything he might say could be used against him (HM 83). At no time during this period was he advised that he could consult counsel (HM 83).

Appellant testified at trial that he was not allowed to sleep or to eat during the 19 hour period preceding the confession (T.401). This claim was uncontradicted. Detective Corbett testified at the trial and at the Huntley hearing that he saw food brought into the interrogation room at the 30th Precinct during the morning of February 18 although he did not see appellant eating (T. 350; HM 73a). Corbett also testified at trial that he "didn't think" appellant had slept (T. 382). At the Huntley hearing he changed his testimony somewhat in stating he did not know if appellant had slept during the night of February 17-18 (HM 84),

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7. In apparent violation of §165 of the Code of Criminal Procedure (HM 90).

but he had seen appellant being brought into a dormitory room by other officers on a "couple" of occasions for periods of 20-30 minutes (HM 73a,74). Appellant testified that he was beaten in a room with beds (T. 401). Detective Beckles did not dispute at any time appellant's claim that food had been denied and he did not testify at the trial on the claim that sleep had been denied. At the Huntley hearing he testified that he had observed appellant being taken to the dormitory room on "numerous" occasions throughout the night for periods of 15-45 minutes (HM 68). However, he still "did not know" if appellant had slept during the night (HM 64). The unidentified police officers who took appellant to the dormitory room were never brought forward to testify.

In summary, although Beckles and Corbett spent most of the night of February 17-18 at the 30th Precinct, both were unable to testify in detail as to what actually took place. Corbett also testified that he did not interrogate appellant at the 30th Precinct (T. 347, HM 73a) and Beckles testified that he left the 30th on "several" occasions during the night (HM 59,64). The State produced no additional witnesses to rebut appellant's claim that he had been denied food and sleep.

As already indicated, appellant also testified at trial that he was physically beaten by police to secure the confessions and the money at both the 30th and 42nd Precincts during the 19 hour pre-confession period. And, his testimony was corroborated by the two civilian witnesses, Jones and Johnson, who saw him "hit" and "dragged" and "lying on the floor like a dog" in the 42nd Precinct.

Although Detectives Beckles and Corbett denied participating in beatings upon appellant, they also testified that they were not with appellant for substantial periods of time in the precincts. They testified that other police officers were in charge of appellant and interrogated him, but these officers were never brought forward to testify. Appellant named Inspector Walsh as one of these and accused Inspector Walsh of participating in the beatings, but he was never produced, and appellant's own requests for his production as a witness were denied.

Finally, promises and deceptions were used on appellant. He was told that if he confessed other charges would be dropped, that his confession would be used to his benefit in court and to safeguard his property and that the police would help him in court if he put his trust in them since there was no one else who could help him. Of course, he was never advised of his constitutional rights which included the assistance of counsel on his behalf.

Furthermore, it should be noted that illegal and suggestive show-ups were conducted in the 30th Precinct on the night of the arrest: appellant was exhibited through a peephole singly or dressed as the robber in a four-man line-up, and the witnesses were asked to identify him as the robber. Detective Corbett used the resultant identifications in his final conversation with appellant prior to the confessions to convince appellant to confess (see his testimony at T. 370-371); the confessions were thus tainted by the illegal show-ups. Gilbert v. California, 388 U.S. 263 (1967); United States ex. rel. Stovall v. Denno, 388 U.S. 294

(1967); United States v. Wade, 388 U.S. 218 (1967); Wong Sun v. United States, 371 U.S. 471 (1963).

In a long series of cases over the past 38 years the United States Supreme Court has held repeatedly that the use in a state criminal trial of a defendant's confession obtained by coercion -- whether physical or mental -- is forbidden by the due process clause of the Fourteenth Amendment. See, e.g. Brown v. Mississippi, 297 U.S. 278 (1936); Ashcroft v. Tennessee, 322 U.S. 143 (1944); Payne v. Arkansas, 356 U.S. 560 (1957); Culombe v. Connecticut, 367 U.S. 568 (1961); Clewis v. Texas, 386 U.S. 707 (1969). When presented with a claim of coercion, the Court has recognized its duty to make an independent determination based upon the uncontraverted facts bearing on voluntariness. The court has adopted, therefore, a test of reviewing the "totality of the circumstances" surrounding the confession.

Some of the significant factors which, aside from beating, have been included in the totality of circumstances formulation are: (1) The failure to advise a defendant of his right to remain silent or of his right respecting counsel at the outset of interrogation. Davis v. North Carolina, 384 U.S. 737, 740 (1965); (2) The unreasonable delay in arraignment. Clewis v. Texas, 386 U.S. 707, 711 (1967); (3) The detaining of a defendant without means of communication for an extended period of time following arrest. Haynes v. Washington, 373 U.S. 503, 511 (1962); (4) The failure to provide food and sleep. Payne v. Arkansas, 356 U.S. 560 567 (1957); (5) The defendant's age, health, education and mental stability. Haley v. Ohio, 332 U.S. 596 (1948) and (6) The promises made to the defendant to induce a confession. U.S. ex rel.

Everett v. Murphy, 329 F. 2d 68 (2d Cir. 1964); Molloy v. Hogan 378 U.S. 1, 7; Bram v. U.S. , 168 U.S. 532, 542-543. Obviously any single factor or a combination of factors may cause a confession to be held involuntary.

After weighing the relevant circumstances surrounding a confession, the Supreme Court has found a denial of due process if "the individual's will was overborne", Rogers v. Richmond, 365 U.S. 534, 544 (1961) or if the confession was not "the product of a rational intellect and a free will", Blackburn v. Alabama 361 U.S. 199, 208 (1960). Indeed, the violation of due process is so serious that when a coerced confession has been admitted, even overwhelming additional evidence of guilt will not prevent the conviction from being overturned. See Rogers v. Richmond, *supra*, 365 U.S. at 541.

When viewed in the light of the preceding discussion, appellant's confessions clearly were involuntary based on the undisputed facts brought forth at his trial and Huntley hearing. The significant factors constituting the "totality of circumstances" in his case were as follows:

Appellant was arrested at 8:30 P.M. on February 17, 1958, allegedly on the unrelated complaint of Mrs. Waller. He confessed to a bank robbery some 19 hours later at 3:30 P.M. on February 18 and was arraigned on the bank robbery charge at 10:00 A.M. on February 19 after 38 hours of continuous custody. During this entire period of arrest to arraignment he was held incommunicado⁹

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⁹ See Miranda v. Arizona, 384 U.S. 436, 475-6 (1966) & United States ex rel. Wade v. Jackson, 256 F. 2d 7 (2d Cir., 1958).

and was subjected to interrogation until the confession was extracted from him. In Haynes v. Washington, supra, emphasis was placed on the defendant's being held incommunicado for 16 hours while he made and signed a confession, in holding the confession involuntary based on the totality of circumstances. Unlike appellant in this case, the defendant in Haynes was not subjected to a prolonged overnight interrogation. Also, the defendant in Haynes made an oral confession within two hours of his arrest as opposed to appellant's claims of innocence for 19 hours.

Following his arrest appellant was investigated continuously at two police stations in connection with the bank robbery yet a search of the entire record reveals that at no time was he ever advised of his constitutional right to remain silent or of his right respecting counsel by any of his numerous interrogators. Such a procedure by the police is in direct conflict with Davis v. North Carolina, supra. In Davis, the defendant was taken into custody in connection with a murder investigation and was held incommunicado until he confessed. The Court states unequivocally (384 U.S. at 740):

[T]hat a defendant was not advised of his right to remain silent or of his right requesting counsel at the outset of interrogation.... is a significant factor in considering the voluntariness of statements later made. This factor has been recognized on several of our prior decisions dealing with standards of voluntariness (Cases cited). (Emphasis added)

In Johnson v. New Jersey, 384 U.S. 719, 730 (1965) the Court, confronted with another coerced confession situation, stated that the test of voluntariness "takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow his access to outside assistance." (Emphasis added).

Appellant was arrested on the alleged assault complaint of Mrs. Waller, but he was never booked or arraigned on that complaint. The New York Code of Criminal Procedure §165 provides that an arrested person must be taken before a magistrate for arraignment "without unnecessary delay". In appellant's case, he was held in custody for 19 hours solely on the basis of the alleged assault complaint while he was investigated and interrogated about an unrelated bank robbery. If he had been arraigned lawfully on the Waller complaint and had counsel been properly appointed on his behalf (none was appointed at arraignment), the possibility of a coerced confession taking place thereafter would have been greatly reduced.

Furthermore, there are no facts in the record from which Beckles, the arresting officer, could have concluded that there was probable cause to arrest appellant on any charge, let alone the bank robbery which was the obvious purpose of appellant's detention and interrogation. Mrs. Waller testified only that appellant left the money in her apartment and later accused her of taking some of it and said he'd return for the missing amount. She did not testify to an assault, and there is nothing in her

testimony which could have linked appellant or the money to the specific bank robbery in question.

Despite the relevance of the legality or illegality of the arrest on the issue of the voluntariness-admissability of a confession taken during the period of detention following the arrest (U.S. ex rel. Everett v. Murphy, 329F. 2d 68 (2d Cir. 1964) cert. den. 377 U.S. 967 (1964); Davis v. Mississippi, 394 U.S. 721 (1969); Morales v. New York, 396 U.S. 102 (1969)) the trial (Huntley) judge in this case would not consider it.

Based on the State's version of what took place at the 30th Precinct during the night of February 17-18, appellant was taken into a dormitory room on numerous occasions by unidentified police officers for periods of 15-45 minutes (HM 68,74). Throughout the night, however, he was removed periodically from this room and subjected to questioning about the Bronx bank robbery. Detective Corbett provided the only testimony contrary to appellant's claim that he was not allowed to eat. However, Corbett stated only that he saw food brought into the room where appellant was being interrogated and he did not say that he saw appellant actually eating or even that he knew the food brought into the room was for appellant (T. 350). Despite appellant's claim that he was denied both food and sleep during the pre-confession period, no witness was produced at trial or at the Huntley hearing to refute these claims. It is also noteworthy that the testimony concerning the opportunity to sleep in the dormitory room appeared for the first time at the Huntley hearing. The harmful effect of the denial of food and sleep cannot be questioned. See

United States ex. rel. Wade v. Jackson, 256 F. 2d 7 (2d Cir., 1958).

The stationhouse atmosphere -- incommunicado interrogation about an unrelated crime for 19 hours, virtually no rest, no food, an offer to drop a charge pending in another jurisdiction if he cooperated, the successive promise that his position that the money subsequently used to help convict him of the robbery belonged to him would not be assailed if he disclosed the money's location and, finally, a promise of leniency -- inherently produced an overall effect of extreme psychological pressure upon appellant. United States ex. rel Everett v. Murphy, supra; Molloy v. Hogan, supra; Bram v. United States, supra; Culombe v. Connecticut, 367 U.S. 568, 575 (1961). There can be little doubt that the investigators intended to wear down the appellant's will to resist their assertions that he committed the robbery.

Appellant was a 22 year old black man with a 9th grade education at the time of his arrest. His past criminal record showed that he had been arrested and convicted once before as a youth. His contact with law enforcement techniques was therefore minimal. Although "[I]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations..."

(Miranda v. Arizona, supra, 384 U.S. at 468), the pre-trial minutes reveal that appellant was sent to Bellevue Hospital for psychiatric tests prior to his trial. Although it was concluded ultimately that he was competent to stand trial, the tests also indicated that appellant was "suffering from severe character disorder of the schizoid type" (Pre-trial Minutes of May 26, 1958

at page 4). It is clear from other pre-trial hearings that Judge McCaffrey was aware of the Bellevue diagnosis (see Pre-trial Minutes of August 19, 1958 at page 2). The fact that appellant was "hospitalized for mental observation" at the time in question was referred to at the trial (T. 478). Unquestionably appellant's background and the Bellevue diagnosis are relevant factors to be included in the totality of circumstances test.

We submit that the combination of all these factors presents a staggering scenario in which appellant had no choice but to yield to his interrogators' demands. The unsavory and illegal police tactics created and maintained an atmosphere which was intended to break his will and produce the much desired confession. Under such circumstances, appellant's confessions must be held involuntary as a matter of law in violation of the due process clause of the Fourteenth Amendment. Significantly, both the adverse Huntley decision and the District Court's denial of habeas corpus clearly show that these factors were never considered in the voluntariness determinations, and that there has been no determination of the effect on the question of voluntariness of any and all of the above factors.

As already shown, the correct constitutional standard for determining the voluntariness of appellant's confession requires a consideration of both mental and physical factors. Appellant was clearly denied the right to have the jury instructed according to this standard. Haynes v. Washington, 373 U.S. 503, 316- 18,

(1963) stands for the proposition that a federal court must grant a new trial if a petitioner has been convicted in a state court on the basis of a jury charge which employed improper constitutional standards of voluntariness. In Haynes, the Supreme Court noted that the trial judge's erroneous instruction concerning the significance of the failure of the police to advise the accused of his rights vitiated the jury's findings of voluntariness and would require a redetermination. The erroneous charge, in pertinent part, was as follows (373 U.S. at 517):

And in this connection, I further instruct you that a confession or admission of a defendant is not rendered involuntary because he is not at the time of making the same reminded that he was under arrest or that he was not obligated to reply, or that the answers would be used against him, or that he was entitled to be represented by counsel.

While this instruction was not per se erroneous because the failure to give warnings is only one of many factors, the Court inferred (373 U.S. at 517, p. 11):

(t)hat the jury was to take this charge as precluding consideration of the cited factors was evidenced by the immediately succeeding instruction which advised that it should consider a denial of communication with friends or an attorney in connection with determining whether the.... confession was voluntary or not. (Emphasis in original)

Similarly, the jury was charged at appellant's trial (T. 658):

Under our law there is no obligation upon a district attorney or police officer to first warn a defendant or suspect of his constitutional and statutory rights such as the right against self-incrimination and right to counsel, in order to obtain a valid confession.

In concluding, Judge McCaffrey stressed the physical aspect of voluntariness and effectively precluded consideration of the mental factors (T. 667):

The court will charge that in deciding whether the defendant was coerced into confessing, the jury may take into consideration the length of time in which he was held by the police prior to arraignment and any physical pressure applied to him. You have an exception as to my omitting the mental or psychological.

The charge given at appellant's trial was even more defective than the erroneous Haynes charge and a similar inference must be drawn. In appellant's case, all factors of mental coercion, except the delay in arraignment, were rejected, while in Haynes only the single factor of the failure to advise the accused of his rights was excluded. There can be no doubt that the charge in appellant's case prevented the jury from making a proper determination of voluntariness.

In this Court's recent case of Negron v. Henderson, 496 F. 2d 858, (2d Cir., 1974) the jury was instructed by the state court that the failure of the police to advise the petitioner of his constitutional rights prior to questioning had no bearing whatsoever on the voluntariness of his confession. The respondent conceded that this instruction was erroneous but contended, inter alia, that any error in the jury instruction was a matter of state law only. The court implicitly rejected this contention in deciding the case on other grounds. Haynes and Negron clearly indicate that the jury instruction is not insulated from federal due process considerations, especially, as here, where "the erroneous jury instruction does bear closely upon [appellant's] allegations of psychological coercion...." Negron, supra at 860.

Although the undisputed facts surrounding appellant's confession are sufficient to enable this Court to find his confessions involuntary as a matter of law, appellant asserts additionally that he has never been afforded a full and fair hearing to determine the voluntariness of his confessions as provided by Townsend v. Sain (372 U.S. 293 at 312 (1963)):

Where the facts are in dispute, the federal court.. must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. (Emphasis added).

The Court went on to list five somewhat overlapping circumstances in which a federal evidentiary hearing is essential: (1) state factfinding procedures were inadequate; (2) newly discovered evidence is alleged by the petitioner, (3) the development of facts at the state level was inadequate; (4) the state determination was not fairly supported in the record and, (5) the state courts did not actually resolve the relevant factual issues on the merits.

The particular circumstances of appellant's case are most closely analagous to numbers (3), (4) and (5) above. The Townsend opinion noted (372 U.S. at 317):

If, for any reason not attributable to the inexcusable neglect of petitioner... evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled.

Since no court has properly considered the mental factors surrounding appellant's confessions, if this Court should hold that crucial evidence concerning mental coercion has not been developed, then

it should reverse and remand for a full hearing. For example, it is undisputed that appellant spent 19 consecutive hours of incommunicado interrogation until he confessed and that he was never advised of his right to remain silent or that he could consult with counsel. Appellant testified (T 405) that he was told by his interrogators that a criminal charge in Manhattan would be dropped if he produced the money that helped to convict him, and Detective Beckles testified in effect (T. 325-326) that he promised appellant that if he disclosed the location of the money his position that the money belonged to him would not be impugned. Detective Corbett testified that he promised appellant help when he got to court if he confessed (T. 381). In both cases incriminating disclosures came almost immediately after the offers were made. According to Corbett, the confession to him came during a ten minute interrogation session (. 378-382) in which the promise was given. Although these factors were raised and urged upon the various courts from the beginning, the courts refused to make a proper assessment of the effect of these promises in the totality of circumstances or otherwise on the question of voluntariness. Molloy v. Hogan, 378 U.S. 1,7 (1964). As we have argued, the legal significance of the facts as elicited requires a finding of involuntariness, but, at the least, a hearing should be held.

It was also established before trial that appellant was suffering from a "severe character disorder of the schizoid type". Certainly, before the question of mental coercion can be decided

against appellant, there should be professional testimony concerning the ability of a schizoid personality of appellant's type to withstand the pressure applied ^{to} him. Yet, in response to the appellant's testimony of both mental and physical coercion, there was an extremely inadequate explanation offered by the State as to what took place during those 19 hours. The testimony of Beckles and Corbett was conflicting in parts and both admitted that they were not present during the entire time of appellant's detention and interrogation regarding the bank robbery. The State did not produce any of the others who might have given appellant food and allowed him to sleep. The presence of other officers who were intimately involved with the investigation and interrogation of the defendant in connection with the robbery is undisputed (T. 337, 340, 375, 401-402; HM 73a, 82).

Furthermore, although it was the State's burden to prove these confessions voluntary and to call the witnesses who would negate appellant's allegations, the State did not do so. The State chose to leave unchallenged the facts of coercion. On this basis alone, then, appellant's writ should have been granted. But, appellant himself has been inexplicably faulted with the failure of these witnesses to be produced, when it was the inaction of the District Attorney, the Courts, and to some extent his trial and Huntley hearing counsel, who did not produce them, after appellant alone made repeated requests both at the trial and at the hearing (T. 622:HM 21-28). Thus, Judge Port was in

error when he held below, "their materiality to the Huntley hearing is open to question..." We have shown their materiality, to supply missing negatives of appellant's allegations; the inferences from their absence should be drawn against the State for whose benefit their testimony was necessary.

As discussed earlier, the proper constitutional standard for determining a claim of mental coercion is a review of the totality of the circumstances. It could be argued (invalidly, we submit) that the State Courts employed this test, without expressly mentioning it, and this is apparently the basis for Judge Port's conclusion below that, "I will not presume that both sides were unaware of and applied the wrong standards to test the voluntariness of petitioner's confessions." Appellant submits that the Huntley judge expressly indicated that improper constitutional standards were applied by him. At trial the judge clearly issued improper voluntariness instructions to the jury (see supra at pg.28-29) and indicated that the circumstances of the arrest and the events at the 30th Precinct would play no part in the determination of voluntariness-admissability, (T. 335-337).., and the post-trial Huntley hearing court, presided over by the same judge, specifically included only physical coercion as the standard for determining voluntariness. The Court stated:

This Court is satisfied beyond a reasonable doubt that the statements made by defendant to Detective Beckles and to Detective Corbett, respectively, on the 18th of February, 1958 at the 42nd Precinct were voluntarily made and were not the result of physical coercion of any kind. Accordingly, the motion is denied. (Emphasis added).

This same judge, after setting out a review of selected portions of the trial and hearing testimony in his opinion, omitted any references to the presence or absence of probable cause for the arrest, the testimony of the officers about the promises made to appellant, the circumstances of the 30th Precinct overnight detention without booking, the absence of testimony negating the lack of food and sleep, the lack of rights advice, the 38 hour delay in arraignment and the other circumstances in the entire process of will overbearance obviously practiced here on a young, uneducated defendant of questionable mental stability. The Court thus did not make a determination "fairly supported in the record" and "did not actually resolve the relevant factual issues on the merits." Townsend v. Sain, supra. Instead, the State Court's determination was based on appellant's failure to call his two witnesses at the trial, when, as has been argued, he himself objected at trial to counsel's failure to call them (T. 622) and notwithstanding that the failure to call these witnesses at trial does not disturb the reality of the actual facts of coercion already elicited. And, instead, the State Court improperly relied on a second extraneous factor, appellant's failure to complain of the police mistreatment to the arraigning magistrate. This reliance itself is a deprivation of appellant's rights under the Sixth and Fourteenth Amendments, the use of evidence secured from the February 18, 1958 arraignment proceeding at which appellant did not have counsel and when he was hussled on and off in a matter of minutes not knowing what was happening or who could help him. Arsenault v. Massachusetts, 393 U.S. 5 (1968).

"From a fair reading of these expressions" of the court made both upon its charge to the jury on the question of voluntariness and in the concluding statement of its opinion following the Huntley hearing, it cannot but be concluded that the question whether the confessions were inadmissible was answered by reference to an unconstitutional legal standard which deprived appellant of due process of law. Rogers v. Richmond, supra, 365 U.S. at 543-544.

The prior decision by the Western District seemingly ignored Townsend in rejecting appellant's application. It would have been logically impossible for that court to assume that the State court applied the correct standard in determining coercion since its own decision revealed a failure to recognize the proper standard. The court stated, in pertinent part :

Upon review of the transcript of the (Huntley) Court's decision, this court finds no reason to disturb his conclusion that the petitioner's statements to the officers were voluntarily made and were not the result of physical coercion of any kind. (Emphasis added)

In fairness to the federal court, appellant's handwritten pro se application may not have presented his argument in the clearest light. * In any case, neither the Western District nor the Northern District on the instant petition made its own deter-

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* In this connection see Judge Port's erroneous evaluation of appellant's arguments : "Petitioner relied most heavily upon the alleged physical coercion to upset the voluntariness of his confessions, vis a vis the claimed mental or psychological coercion." On the contrary, appellant has tried all along to impress on the various courts that, beatings aside, there was psychological coercion and illegal police activity of the grossest kind in this case.

mination on the merits, clearly relying on the non-determination of the Huntley judge.

Finally, to the extent that the Huntley court did not consider the confession to the District Attorney in the 42nd Precinct, testified to at the trial by the stenographer who transcribed it almost immediately after the oral confession to Corbett, or, to the extent it failed to consider any other statements or confessions on grounds that the Huntley hearing counsel has asked the court to consider only the trial testimonies of Corbett, Beckles and appellant, appellant was deprived of a fair hearing. This was an error by counsel at that time who thought all the confessions given were contained in the trial testimonies of Corbett and Beckles. He forgot that the stenographer testified to the transcription of the confession. Appellant vigorously objected at the hearing and requested that the entire trial testimony be included, and that he had not had a recent opportunity to review selected portions. Only after counsel's insistence that those portions were all that was necessary, did appellant reluctantly assent (HM 2-3, 11-12, 23-24, 26-28, 35-37). To the extent that any confessions were thus not considered by the Huntley judge,** appellant has not had a fair hearing.

Appellant's application for habeas corpus should not be barred by the previous denial of federal habeas corpus relief in the Western District. It is clear that that decision was not a separate consideration of the merits, but rather a reliance on the State Huntley decision.

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** In any case the finding of voluntariness would have had to include the stenographic confession which followed on the heels of the oral ones.

Judge McCaffrey held a Huntley hearing to determine whether petitioner's confession was voluntarily made, writing a decision setting forth in detail his findings of fact and conclusions of law. Upon review of the transcript and the court's decision, the court finds no reason to disturb his conclusion that the petitioner's statements to the officers were voluntarily made and were not the result of physical coercion of any kind. (See opinion attached hereto).

As the above analysis of the facts of this case reveals, a separate consideration of those facts leads to the inevitable conclusion that the confessions were involuntary and inadmissible as a matter of law. And, if not, any court giving that separate consideration should have been able and willing to state its own reasons for reaching a different conclusion, to explain how, under the factual circumstances conceded or uncontradicted, the confessions would be voluntary. The Western District judge did not do so. No court has done so in this case. Since, as we have argued, the Huntley judge did not consider all the factors, his conclusion was not on the merits. Any decision by the Western District which used that conclusion, rather than the facts of the case, as the starting point for its consideration, has not dealt fairly with the substance of appellant's claims. Indeed, Judge Curtin recites almost verbatim the words of the Huntley judge disregarding psychological coercion: "voluntarily made and were not the result of physical coercion of any kind."

In Sanders v. United States, 373 U.S. 1 (1963), the Supreme Court determined that an application for habeas corpus can be barred because of a prior application for federal habeas corpus

relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application. Neither condition 2 nor 3 above can be applied to the case at bar and appellant's additional claim in his Northern District petition of an incomplete and unfair Huntley hearing was not passed upon by the Western District.

The Sanders decision referred to the case of Hobbs v. Peppersack, 301 F. 2d 875 (4th Cir., 1962) in discussing prior adjudications on the merits. In Hobbs, the petitioner's previous denials were held not to be on the merits because the previous courts (301 F. 2d at 879, f.n. 3) "...did not discuss his contention and summarily denied relief." A similar situation exists in the case at hand since Judge Curtin did not discuss the contention of mental coercion in summarily denying the application.

In this context it should be emphasized that the prior application to Judge Curtin was made without the benefit of counsel, The issues were brought to the court's attention in a handwritten brief composed by an inmate with a ninth grade education and no legal training whatsoever, and were perhaps not presented "as clear as a mountain lake in springtime." Ferranto v. United States (2d Cir., October 31, 1974, Docket No. 74-1366) slip op. at 196. Appellant's inability to raise these complex

issues properly should not be held against him. "The point is only that if the prior application was disposed of without the appointment of counsel, a subsequent application must be considered on its own merits and not summarily disposed of on the basis of the previous denial." Tucker v. United States, 427 F. 2d 615, 617-618 n. 13 (D.C. Cir., 1970). Considering both the magnitude of the constitutional defects and the inadequate treatment accorded the prior pro se application, a compelling situation for applying the "ends of justice" discretion also confronts this court. See Reitz, Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 520 (1960).

Finally, any argument that the admission into evidence of appellant's coerced confessions, including his act of leading the police to the money on a Manhattan rooftop, was harmless error, must fail. The only other evidence against him at the trial were the severely attacked identifications of the bank customers and tellers. According to their testimonies, the robbery took a total of 3 minutes. Two weeks thereafter they were at the Precinct in a group to view one man who the police told them was the robber (in a couple of cases, appellant was exhibited in a small line-up but as the only man dressed in the same clothes as the robber).

Thus, given these highly suggestive procedures, the jury may have had doubts about the accuracy of the identifications, but those doubts were certainly removed by the corroborating

confessions. Their admission into evidence could thus not be regarded as harmless error. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession... and even though there is ample evidence aside from the confession to support the conviction."

Jackson v. Denno, 378 U.S. 368, 376 (1964). "Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions." Miranda v. Arizona, 384 U.S. 436, 482 n. 52 (1966); Wong Sun v. United States, 371 U.S. 471, 493 (1963).

CONCLUSION

FOR THE ABOVE STATED REASONS
THE ORDER AND JUDGMENT OF THE
DISTRICT COURT SHOULD BE REVERSED
AND APPELLANT'S PETITION FOR A WRIT
OF HABEAS CORPUS GRANTED OR,
ALTERNATELY, THE CASE REMANDED FOR
A HEARING ON DISPUTED FACTUAL
ALLEGATIONS.

Respectfully Submitted,

LAWRENCE STERN

Attorney for Petitioner/Appellant
11 Monroe Place
Brooklyn, N.Y. 11201
875-4304

